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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 120

UNITED STATES OF AMERICA, PETITIONER

v.

GUARANTY TRUST COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

This case, we submit, is governed by the principle announced in the case of *Closter Nat. Bank* v. *Federal Reserve Bank of New York,* 285 Fed. 138 (C. C. A. 2d), certiorari denied, 261 U. S. 613. There the court had before it almost the exact question now involved, namely, the effect of a Treasury regulation making the handling of Government checks "subject to final payment by the Treasurer of the United States" and providing that the Federal Reserve Bank of New York "as a condition of receiving government warrants and checks on the Treasurer of the United States from member banks for credit, reserves the right to charge back and

return to the depositor at any time and unconditionally any such item deposited with the Federal Reserve Bank of New York." The court said (p. 140):

> The contract between the parties embraces the contents and obligations imposed by the circular letter No. 37. The defendant in error was appointed depository and fiscal agent of the United States, and it offered to certain member banks of the Second Federal Reserve District the option of presenting for payment checks and warrants on the Treasurer of the United States through it, but it made the terms as set forth in the circular above. The plaintiff in error was free to accept or refuse to accept the services of the defendant in error as it saw fit. It might have used other available means for collecting government checks and warrants, if it so desired. While immediately crediting the account of the plaintiff in error with the defendant in error, it was always subjected to final payment by the Treasurer. Crediting the account accorded an advantage to the member banks in affording means for making funds promptly available. In undertaking this service, the defendant in error became a collecting agent. Under the terms of the circular, defendant in error had the right, should the United States at any time not pay, to return such check for any reason which the government might consider good, and the defendant in error could at any time and unconditionally charge back the

amount credited to the plaintiff in error, at the same time returning the item so charged back. The right to do so was indefinite as to time; it might be done at any time and unconditionally. It was with this understanding and agreement that the defendant in error gave credit and accepted the obligation to perform this service for the plaintiff in error.

But it is contended that the defendant in error's right to charge back the item is dependent upon its showing that the item was in fact a forgery and alteration as claimed by the Treasurer. By the terms of the collection agreement under which the defendant in error performed the service, the collection agent had the right, if it acted in good faith, to charge back the item to the plaintiff in error's account, without the necessity of establishing a forgery or alteration of the warrant. The memorandum credit accorded, by the agreement of which the circular letter is a part, was always qualified by the clause "subject to final payment." And by that clause the government has for many years exercised the right of returning at any time warrants and checks, which for any cause have not been considered good, and the plaintiff in error was notified that this practice would be continued as a condition of receiving government warrants and checks on the Treasurer of the United States from member banks for credit, with "the right to charge back at any time and return to the depositor at any time

> and unconditionally any such item deposited with the Federal Reserve Bank." To place any other construction upon the terms of the circular would be to treat the phrase quoted as surplusage.

In the pending case the record shows (R. 8–9) that a regulation identical in form—so far as the material elements are concerned—was in effect at the time of the transaction involved; the respondent, Guaranty Trust Company, was fully informed thereof; and "agreed to the terms and conditions herein set forth * * *." (R. 9.)

The attention of the Circuit Court of Appeals was apparently not called to the *Closter National Bank* case, for it is not mentioned by name in the opinion, nor is recognition given to the principle established therein. Moreover, when consideration is given to the decision in the *Closter National Bank* case, the unsoundness of the position taken by respondent in its brief at once becomes apparent. Whatever the usual rule may be regarding guaranteed indorsements, the United States Government, by reason of the Treasury regulation, occupied a preferred position. It was not necessary for the respondent to accept this check or any other Government check, or to present the same to the Federal Reserve Bank, but having done so, with full knowledge of the regulation, it recognized and consented to this preferred position, as a condition of transacting this business, and cannot thereafter be heard to complain.

II

In view of the fact that this case comes clearly within the scope of the *Closter National Bank* case, it is unnecessary for the Court to decide at this time the question of conflict of laws which is argued in the briefs and which formed, in part, the basis for the decision in the Circuit Court of Appeals. In view of the difficulty of the question, it may be wise to avoid a decision of that question at this time. If that decision must be made at this time, however, then it is submitted that the proper rule should be that, at least as to inland bills of exchange, the law of the place of making and performance should govern and the law of the place of transfer should be disregarded.

It is conceded by the respondent that "under American law the forged endorsement of the payee of a negotiable instrument is wholly inoperative, and that no right to retain the instrument or enforce payment thereof can be acquired through the forged signature." (Br. p. 7.) It is conceded by the Government that under the law of Jugo-Slavia the reverse may be true. It is further conceded by the respondent that "If the American law is to apply here, then the petitioner is entitled to a reversal of the judgment below, * * *." (Br. p. 8.)

Respondent has cited several authorities in support of its contention that a rule of conflict of laws should be set up which will recognize the law of

Jugo-Slavia regarding forged indorsements. It is interesting to note that each one of these rely in turn upon the English case of *Embiricos* v. *Anglo-Austrian Bank,* 1 L. R. [1905], 1 K. B. 677. The *Embiricos* case does not support the contention and, as a matter of fact, is authority for the position taken by the Government. That case is based upon Section 72 of the English Bills of Exchange Act. That Act, unlike the American Negotiable Instruments Law, contains several rules for determining conflicts of law. Section 72 is one of these, and, so far as it refers to the present case, reads as follows:

> 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:
>
> * * * * *
>
> (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.
>
> *Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payor be interpreted according to the law of the United Kingdom.* [Italics ours.]

An examination of the facts of the *Embiricos* case shows at once that they did not come within the terms of the proviso of subdivision (2) of Section 72, but related to a foreign bill of exchange, a

cheque drawn by a Roumanian bank in Roumania. Romer L. J. makes it very clear that the case does not fall within the proviso just referred to when he says at page 686:

> The proviso to that subsection—"That where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom"—does not touch the present case.

However persuasive the decision may be, therefore, as applied to the rule of conflict generally, the fact cannot be escaped that for some reason England was unwilling to adopt such a rule for application to cases of inland bills. Oddly enough, each one of the authorities upon which respondent relies, and which in turn rely upon the *Embiricos* case, fail to notice the distinction, clearly made in the Bills of Exchange Act and clearly noted by Romer L. J. in that case. As the check involved in the present case is an inland bill,[1] the *Embiricos* case not only fails

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[1] Negotiable Instruments Law: "Sec. 129. Inland and Foreign Bills of Exchange: An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill."

Bills of Exchange Act: "Sec. 4. (1) An inland bill is a bill which is, or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

"For the purposes of this Act 'British Islands' means any part of the United Kingdom of Great Britain and Ire-

to support respondent's contention but becomes authority for the Government's contention. If a rule of conflict of laws is to be enunciated at this time upon the basis of that case, it must necessarily contain a proviso to the effect that the law of the place of drawing and paying shall govern in determining the validity and effectiveness of a forged indorsement of an inland bill of exchange.

It is to be noted also that the other cases cited by respondent involve conflicts between the laws of countries which are embraced within what is called the Anglo-American system as distinguished from the Continental system of law. Even though a rule of conflict speaks generally when applied to such a situation, certainly a new element arises when it is proposed to make it applicable to other systems of law, inconsistent with and out of harmony with the underlying, fundamental concepts of Anglo-American jurisprudence. Would the proponents of this rule insist that it be made applicable to Japanese, Chinese, and other systems of law as well as the Continental? Where shall the line be drawn? It is said that the Government in this case sent the check to the payee in Jugo-Slavia and

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land, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

"(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill."

That a check is a bill of exchange in Anglo-American law, see B. E. A. Sec. 73 and N. I. L. Sec. 185.

must therefore have contemplated its negotiation there. But the rule proposed to govern this case, would include a case in which a check was intended only for negotiation and payment in the District of Columbia but which was stolen and carried away to another country.

Even as to rules of law in operation in other Anglo-American countries, the courts of the United States have refused to give effect, where they were out of harmony with our ideas of justice and public policy. *Compania La. Flecha* v. *Brauer,* 168 U. S. 104; *The China,* 74 U. S. (7 Wall.) 53. This is equally or perhaps more true in the case of laws of countries outside of the Anglo-American system. Thus in *Oscanyan* v. *Arms Co.,* 103 U. S. 261, at page 277, this Court said:

> But admitting this to be otherwise, and that the Turkish government was willing that its officers should be allowed to take commissions on contracts obtained for it by their influence, that is no reason why the courts of the United States should enforce them. *Contracts permissible by other countries are not enforceable in our courts, if they contravene our laws, our morality, or our policy. The contract in suit was made in this country, and its validity must be determined by our laws. But had it been made in Turkey, and were it valid there, it would meet with the same reprobation when brought before our courts for enforcement.*

> The general rule undoubtedly is that the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; but to this, as to all general rules, there are exceptions, and among these Story mentions *contracts made in a foreign country to promote or reward the commission of crime, to corrupt or evade the due administration of justice, to cheat public agents, or to affect the public rights, and other contracts which in their nature are founded in moral turpitude, and are inconsistent with the good order and solid interest of society.* "All such contracts," he adds, "even although they might be held valid in a country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence in the administration of international jurisprudence." Story, Conflict of Laws, sect. 258. [Italics ours.]

It must be observed that throughout the length and breadth of the Anglo-American countries the rule is that a forged indorsement of a bill of exchange is invalid. A rule of conflict which is intended to operate within those countries would, then, have the effect of recognizing the ideas of morality, public policy and justice expressed by this uniform legislation and the common law upon which it is founded. When that rule is extended to include in its operation the laws of other countries,

the result may be, as is plainly evident here, the adoption into our system of law of legal concepts entirely inconsistent therewith. What greater inducement could be given "to promote or reward the commission of crime, to corrupt or evade the due administration of justice" than to put a premium on forgery as would be done by the adoption of this rule? It avails nothing to reply that we are considering a rule of choice as to which of two conflicting laws shall be used. The effect of the adoption of the rule contended for by the respondent would be to incorporate the provision of the Continental system of law into our law whenever the rule of conflict were applied. The American Law Institute Restatement, upon which the respondent relies for support of its contention, recognizes the difference between the fundamental legal concepts of the common law and those of the legal systems of other countries (pp. 32–34):

> § 4. COMMON LAW DEFINED.
>
> *The common law is the general Anglo-American system of legal concepts and the traditional legal technique which forms the basis of the law of the states which have adopted it.*
>
> *Comment:*
>
> *a.* The common law, as defined in this Section, is intended to characterize that system of legal thought and the legal technique which the courts in Anglo-American states employ in the determination of legal controversies. It is to be distinguished from "the

law of a particular state", whether statute law or common law as defined in § 3. It sometimes happens, therefore, that the law of one particular state will differ from that of another state although both states employ the same system of legal concepts and the same traditional technique as the basis of their law. *When it is necessary to the determination of a legal controversy to determine whether the law of one or another of two or more states is applicable to a legal situation, such determination is made according to the principles of Conflict of Laws which is itself a part of the general system of the common law as defined in this Section* (*see* § 5). [Italics ours.]

b. The definition of the common law as stated in this Section is not intended to convey all the characteristics of such law, but only such as may be important in the Restatement of this Subject. Other qualities of the common law are of importance such as the technique or application of law and the presuppositions as to justice and economic need which, being in the minds of lawyers, color their application of the common law system from age to age. It is, in fact, the latter element which in most cases leads to changes in the common law. *For the purposes of the Restatement of this Subject, however, the distinction between the law of a particular state and the general system of common law is the particular point of interest.* [Italics ours.]

* * * * *

§ 5. LEGAL NATURE OF CONFLICT OF LAWS.

The rules of Conflict of Laws are part of the law of each common law state, and as such are as binding upon the courts as any other parts of the law of the state.

Comment:

a. That part of the law of a state called Conflict of Laws is not forced on a state by any external power. *The state has the same freedom to adopt its own rules of Conflict of Laws that it has to adopt any rules of law.* Conflict of Laws as adopted becomes no less definitely a part of the law than any other branch of the state's law; and in the application of its principles the courts have no more discretion than in any other part of the law. A mandatory limitation is placed in some instances upon the States of the United States where the Constitution limits the freedom of the States to adopt such rules of Conflict of Laws as they might otherwise see fit to adopt. [Italics ours.]

b. Each court applies the law of its own state, as it understands it; including its own conception of Conflict of Laws. It derives this law from the same sources used for determining all its law; from precedent, from analogy, from legal reason, and from consideration of ethical and social need. In restating this branch of the law the same problems of generally accepted doctrine, of local peculiarity, and of statutory modification are presented as in restating any other subject of the law. [Italics ours.]

Respondent quotes from Lorenzen, *The Conflict of Laws Relating to Bills and Notes,* pages 139–140, in which that authority states the question: *"Is not such a passing of title opposed so clearly to our fundamental notions of justice that giving effect thereto would be in contravention of our policy?"* He then answers the question—relying upon the *Embiricos* case, which, as has been shown, is not in point—by saying: "Whether one rule or the other should be chosen is merely a question of commercial policy. As no moral issues are involved the recognition of such foreign acquired title would not shock the conscience of our courts." It is submitted on behalf of the Government that this is not the correct answer. Much more than a question of commercial policy is involved and long and careful consideration should be given before it is permitted, thus by indirect means, to bring into our law a concept so antagonistic to our uniformly expressed views upon the subject.

Apparently English legislators were willing to make the concession which appears in the rule as set out in the Bills of Exchange Act, recognizing the validity of a forged endorsement of a foreign bill of exchange. Presumably this was done because commercial practice must contemplate the common and frequent interchange of such instruments, and the necessity for some recognition of foreign laws in connection therewith. The danger,

such as suggested in the *Oscanyan* case of promoting or rewarding the commission of crime or corrupting or evading the due administration of justice may perhaps be less in case of the forgery of a foreign bill. Certainly there would not be the same inducement to commit crime as would be involved in inviting thieves to carry inland bills into another country, there to forge indorsements and put them back into circulation, with knowledge that the commercial world would be complacent in its attitude toward such a practice, and the administration of justice in such cases transferred to a foreign forum.

The desirability of delay in establishing a rule of conflict of law upon this point is also shown by the fact that commercial practice regarding the use of checks is not the same in the various countries. This is illustrated by the development by English bankers of what is known as the "crossed check." As was said in the Report of the American Delegate to the International Conference on Bills of Exchange (1910), Senate Documents, Vol. 57, 61st Cong., 3d Sess., 1910–1911, p. 27:

> A crossed check is a check with two parallel lines on the face, between which are usually written the name of a bank or banking house. *A crossed check is payable only through a banker.* Hence it is difficult, if not impossible, for an illegitimate holder to obtain cash for it by presentment at a bank counter. He must deposit the check in an

account at a bank in order that it may be honored when presented by such bank to the institution upon which it is drawn.

The result of this system of crossed checks is to afford a means of transfer of money much safer than the ordinary check, upon which cash can be drawn directly, and affords no inconveniences to persons having a bank account and depositing checks of which they are legitimate holders in such an account for collection.

The system of crossed checks has been as yet employed but little in the United States. *It is not necessary in the matter of inland transactions, for the purposes for which it is employed in England, because the American drawer and payee of a check are protected by the rule making the bank responsible for wrongful payment.* In drawing checks upon foreign institutions, however, the system of crossed checks has been employed to a limited extent by American bankers. Its advantages are such that it has gradually obtained a footing on the Continent of Europe, even in the absence of definite legislation giving it legal recognition. [Italics ours.]

The differences between Anglo-American and Continental rules regarding checks and other bills of exchange are so great that they cannot be worked out by judicial action in setting up rules of conflict of laws. Even in the efforts which have been made at the Geneva Conferences to unify the rules of pri-

vate international law in relation to bills of exchange, the Anglo-American nations have held aloof,[2] and it has been recognized by writers upon the subject that the fundamental differences between the laws of the Anglo-American nations and those of the Continental countries are so great that

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[2] Gutteridge, 16 Jour. of Comp. Legis. (3d series), pp. 53–54: "It is, no doubt, true that the movement for the unification of the national laws of commercial paper has made considerable progress as the result of the International Conferences held at Geneva in 1930 and 1931. It would be premature to speak with confidence, but there are grounds for the hope that the Uniform Law of 1930 on bills and notes, and the Uniform Law of 1931 on cheques, will ultimately be adopted by the great majority of the twenty-six countries which signed the conventions at Geneva. Such uniformity as may follow will, however, still be regional, because the United States and the British Commonwealth of Nations together with certain of the Latin American Republics have been unable to participate in the movement. It is therefore hardly an exaggeration to say that the majority of the negotiable instruments which now circulate in international commerce will, as heretofore, contain within them the germs of future conflicts of laws. The delegates at Geneva were keenly alive to this aspect of the situation, and an attempt was made to meet it by the drafting of two separate conventions which were intended to unify the rules of private international law in relation to bills and notes (Convention of 1930), and in relation to cheques (Convention of 1931). These were signed by all the nations which adhered to the two conventions on the substantive or material law, and the hope was expressed that the Anglo-American countries might see their way to follow suit, even though they felt compelled to stand aloof from the general scheme of unification.

even the possibility of securing uniform legislation is doubtful.[3]

Respectfully submitted.

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NOVEMBER 1934.

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[3] Gutteridge, *supra*, pp. 54, 57–59, and see Hudson and Feller, 44 Harvard Law Rev. 333.

U. S. GOVERNMENT PRINTING OFFICE: 1934